

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 04-72

July 19, 2004

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Casehandling Instructions for Charges that Concern Information
Requests about Strike Replacements

When a union requests information about strike replacements, such as their names, home addresses and telephone numbers, the Board has traditionally found such information presumptively relevant and required its production unless the employer can establish “a clear and present danger” that the union will misuse the information.¹ Reviewing courts, however, have analyzed the issue more broadly, looking to whether, in “the totality of the circumstances,” a confidentiality interest outweighs the union’s need for information.

Applying the totality of the circumstances test, the Eighth Circuit recently enforced in part and denied enforcement in part of the Board’s decision in Metta Electric; it concluded that the circumstances required the employer to produce the names, but not the home addresses or phone numbers of replacement employees.² The Eighth Circuit’s approach followed that of the Seventh Circuit which dealt with this issue in two cases arising out of a strike against the *Chicago Tribune*. In the first Chicago Tribune case, the Seventh Circuit found that the employer committed no violation in refusing the union’s request for names of strike replacements in view of the violence directed at replacements during the strike and the employer’s offer of adequate alternatives to providing the names.³

¹ See, for example, Metta Electric, 338 NLRB No. 161, slip op. at 6-7 (April 30, 2003), enf. granted in part and denied in part, 360 F.3d 904 (8th Cir. 2004). Accord: Advertisers Composition Co., 253 NLRB 1019, 1023 (1981); Chicago Tribune Co., 303 NLRB 682, 687 (1991), enf. denied, rehearing denied, 965 F.2d 244 (7th Cir. 1992); Chicago Tribune Co., 316 NLRB 996, 996 (1995), enf. denied 79 F.3d 604 (7th Cir. 1996); Grinnell Fire Systems Co., 332 NLRB 1257, 1257-1258 (2000), enf. denied in pertinent part 272 F.3d 1028 (8th Cir. 2001), rehearing denied (2002).

² JHP & Assocs., LLC v. NLRB, 360 F.3d 904, 911 (2004), reviewing Metta Electric, 338 NLRB No. 161 (April 30, 2003). See also Grinnell Fire Protection Systems Co. v. NLRB, 272 F.3d 1028, 1029-1030 (2001) (union entitled to names but not addresses and home phone numbers).

³ 965 F.2d 244, 246-248 (1992).

In the second Chicago Tribune case, arising five years after the strike, a different union had obtained the names of replacements in its bargaining unit but sought their home addresses. The Seventh Circuit squarely rejected the Board's "clear and present danger" test as inconsistent with the directive in Detroit Edison that the duty to supply information turns on the circumstances of a particular case.⁴ Under Detroit Edison, the court concluded, where the union already had the replacements' names, the employer had no duty to provide their home addresses in view of the pattern of violence during the strike, the privacy concerns of the replacements themselves who objected to disclosure of the information and the availability of alternative means of communication offered by the employer.⁵

Given this divergence between the Board's traditional standard and that applied by some courts, the General Counsel wishes to formulate a comprehensive position on this important and recurring issue. Accordingly, when such charges are filed, the Region should investigate the relevance of the requested information and the specifics of any confidentiality claim asserted by the Charged Party. It should solicit both parties' position on these issues and submit the case to the Division of Advice.

If you have any questions regarding this memorandum, please contact your Assistant General Counsel or Deputy or the Division of Advice.

/s/
R.A.S.

cc: NLRBU
Release to the Public

⁴ 79 F.3d 604, 607 (1996), citing Detroit Edison v. NLRB, 440 U.S. 301, 314 (1979).

⁵ 79 F.3d at 607. See also Page Litho, Inc. v. NLRB, 65 F.3d 169 (6th Cir. 1995) (table), full text available at 1995 WL 510029, denying enf. 311 NLRB 881, 882-883 (1993) in which the court concluded that the employer did not violate its duty to bargain by failing to provide the names of replacement employees.